

IN THE SUPREME COURT OF TEXAS

No. 97-1168

INGERSOLL-RAND COMPANY, ET AL., PETITIONERS

v.

VALERO ENERGY CORPORATION, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued on October 21, 1998

JUSTICE ENOCH delivered the opinion for a unanimous Court.

JUSTICE OWEN did not participate in the decision.

Like Kellogg, which filed its claim for attorney's fees in *Valero I* after judgment was rendered but before severance was granted, Valero filed an amended petition. Unlike Kellogg, which for the first time asserted a claim for affirmative relief, Valero repackaged its original tort claim upon which the adverse judgment had been rendered as a contract claim. Valero urged in the court of appeals by conditional cross-point that if *res judicata* did not bar Kellogg's claim, then likewise, *res judicata* would not bar its breach of contract claim. The court of appeals, because of its disposition of the appeal, did not consider Valero's cross-point.¹ But because we are reversing and remanding this case

¹ See 953 S.W.2d at 869.

to the trial court, Valero, on motion for rehearing, reminds us of its cross-point and we consider it now.²

Valero's cross-point has no merit. Valero's late-filed amended petition circumvents the trial court's adverse ruling in *Valero I*. In *Valero I*, Valero attacked the validity of the indemnity agreement. By its late-filed amended petition, Valero recast its attack on the indemnity provision as a breach of contract claim, which is classic claim-splitting. This, Valero cannot do.³ The subject of the judgment in *Valero I* was Valero's liability under the indemnity provision; it cannot escape the effect of that judgment through a late-filed amended petition, whether there was a severance order or not. The trial court properly concluded that Valero's "new" breach of contract claim is barred by *res judicata*.

Our opinion and judgment of June 24, 1999 remain unchanged.

Craig T. Enoch
Justice

Opinion delivered: August 26, 1999

² See TEX. R. APP. P. 53.4.

³ See RESTATEMENT (SECOND) OF JUDGMENTS §§ 24, 25(1); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 629-31 (Tex. 1992).